

To: McDavit, Michael W.[Mcdavit.Michael@epa.gov]
From: Hurd, Kathy
Sent: Tue 8/29/2017 8:06:17 PM
Subject: Fwd: FYI - you need to know as it will likely come into play in FL and MI

Sent from my iPhone

Begin forwarded message:

From: "Hurd, Kathy" <Hurd.Kathy@epa.gov>
Date: August 29, 2017 at 3:45:56 PM EDT
To: "Nalven, Heidi" <Nalven.Heidi@epa.gov>
Subject: FYI - you need to know as it will likely come into play in FL and MI

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

From: Armor, Suzanne
Sent: Tuesday, August 29, 2017 2:16 PM
To: Byrne, Andrew <Byrne.Andrew@epa.gov>

Cc: Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Baca, Andrew <Baca.Andrew@epa.gov>; Mancusi-Ungaro, Philip <Mancusi-Ungaro.Philip@epa.gov>; Siegal, Tod <Siegal.Tod@epa.gov>; Baschon, Carol <Baschon.Carol@epa.gov>

Subject: Re: EPA follow-up

Ex. 5 - Deliberative Process

-Suzanne

From: Byrne, Andrew
Sent: Tuesday, August 29, 2017 1:10:08 PM
To: Armor, Suzanne
Subject: FW: EPA follow-up

Ex. 5 - Deliberative Process

Andy Byrne

American Indian Environmental Office

U.S. EPA, Office of International and Tribal Affairs

Phone: (202) 564-3836

From: Byrne, Andrew
Sent: Thursday, July 20, 2017 6:13 PM
To: 'rsantana@llw-law.com' <rsantana@llw-law.com>
Subject: EPA follow-up

Hi Rachael,

This is Andy Byrne at EPA. I called your office earlier today but was told you were on another call, I figured I'd follow up here. You identified two questions regarding the CWA 404 permitting process that I mentioned I would check up on. I spoke to staff here at EPA and summarize what I learned below. These are not official EPA responses, but the result of my discussion with my colleagues and my quick summary back to you.

1. Does EPA retain any enforcement authority if a state receives delegation for the 404 program and chooses not to enforce?

a. Yes. CWA section 404(n), referring to state administration of 404 programs, states that "Nothing in this section shall be construed to limit the authority of [EPA] to take action

pursuant to section 1319 of this title [the enforcement section.]” EPA retains full enforcement authority.

2. I summarized your other question as being was whether a potentially impacted downstream jurisdiction has any ability to provide input on an upstream jurisdiction’s 404 permit. I learned that CWA section 401 applies to section 404 dredge and fill permits in the same fashion as it applies to 402 NPDES permits. Section 401(a)(2) states that “Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant.”

I am unaware how these statutory authorities fully play out in practice, but hopefully that information points you in the right direction.

Thanks Rachael, hope that helps.

Andy Byrne

American Indian Environmental Office

U.S. EPA, Office of International and Tribal Affairs

Phone: (202) 564-3836